Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

No. 77-436

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

DANIEL M. ARMSTRONG,
Associate General Counsel,
JOHN E. INGLE,
Counsel,
Federal Communications Commission,
Washington, D.C. 20554
(202) 632-7112.

INDEX

	Page
1. Conflicts	2
2. Importance	4
3. Error	7
4. Conclusion	10

CITATIONS

Court decisions:

Atlantic Rfg. Co. v. *Public Serv. Comm.*, 360 U.S. 378 (1959) — 6

Bell Tel. Co. of Penn. v. *FCC*, 503 F. 2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975) — 2, 3

City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) — 8

Federal Communications Comm. v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) — 3, 4

Hawaiian Tel. Co. v. *FCC*, 498 F. 2d 77 (D.C. Cir. 1974) — 4, 7

Katzenbach v. *Morgan*, 384 U.S. 641 (1969) — 8

United States v. *Maher*, 307 U.S. 148 (1939) — 8

United States v. *Ruzicka*, 329 U.S. 287 (1946) — 6

Washington Util. & Transp. Comm. v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) — 2, 3

Agency decisions:

American Tel. & Tel. Co., 38 FCC 1222, *aff'd.*, 1 FCC 2d 374 (1965) — 7

American Tel. & Tel. Co., 8 Pike & Fischer Rad. Reg. 1217 (1955) — 7

American Tel. & Tel. Co.—RCA Comm., Inc., 27 FCC 281 (Initial Decision), *aff'd.*, 27 FCC 271 (1959) — 7

Authorization of New or Revised Classifications of Communications (Docket No. 19117), Notice of Proposed Rule Making, 27 FCC 2d 36 (1971), Report and Order, 39 FCC 2d 131 (1973) — 8, 9

ITT World Comm., Inc., 2 FCC 2d 573 (1966) — 7

249-896—77——1

Agency decisions—Continued Page
RCA Global Comm., Inc., 37 FCC 2d 1043 (1972), *rev. sub nom. Hawaiian Tel. Co. v. FCC*, 498 F. 2d 771 (D.C. Cir.) ---------- 7
Rules Governing Ex Parte Communications, 1 FCC 2d 49 (1965) ---------- 10
Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd., sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) ---------- *passim*
Statutes and regulations:
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151–609:
47 U.S.C. § 205 ---------- 9
47 U.S.C. § 208 ---------- 10
47 U.S.C. § 214 ---------- *passim*
47 C.F.R. § 1.1201–1.1251 ---------- 10
Other citations:
Letter to Hon. Lionel van Deerlin from FCC Chairman Richard E. Wiley, September 23, 1976 (comments on H.R. 12323 and related bills) ------- 7
Motion [of MCI] to Strike Consolidated Answer to Motion and Cross-Motion for Leave to File Copies of Commission Decision, filed May 15, 1974, in *Washington Util. & Transp. Comm.* v. *FCC*, No. 71–2919, 9th Circuit ---------- 2, 3, 6, 9
Southern Pacific Transmittal No. 113, Tariff FCC No. 6, filed October 20, 1977 ---------- 6

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

The Federal Communications Commission has asked this Court to grant its petition for writ of certiorari because (1) the decision below conflicts directly with decisions of two other circuits construing the scope of authorized competition by specialized communications common carriers, and conflicts in principle with decisions of this and other courts construing Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, and other public utility certification statutes; (2) the decision would cause fundamental changes and disruption in the communications industry and would have a significant impact on the FCC's common carrier certification process; and (3) the decision is wrong as a matter of statutory construction, in that it ignores the plain language of Section 214 and the FCC's consistent interpretation and application of that statute over

the years. (FCC Pet., pp. 12–26). MCI Telecommunications Corp. and Southern Pacific Communications Co. filed briefs in opposition, and the FCC hereby replies.[1]

1. *Conflicts.* Neither MCI nor Southern Pacific has refuted the FCC's demonstration of direct conflict and conflict in principle between the decision below and decisions of other circuits and of this Court. (FCC Pet., pp. 13–17.) The undeniable fact remains that the Ninth and Third Circuits construed the FCC's specialized common carrier policy [2] as authorizing competition only in the field of private line services. That construction was an essential premise to their affirmance of aspects of the competition policy.[3] MCI's characterization of the findings of those courts as "merely prefatory" (MCI Br., p. 15) is inconsistent with positions which MCI and other parties including the FCC urged on those courts at the time and upon which those courts quite properly relied.

Perhaps the strongest assertion that the specialized carriers were limited to private line services came in a pleading MCI itself filed in the Ninth Circuit to rebut claims that the FCC had authorized specialized carriers to provide the functional equivalent of ordinary long distance telephone service. MCI responded:

> Specialized carriers are *not* authorized to furnish the equivalent [of] ordinary long distance telephone service, and to the best of our knowledge this is the first time anyone has ever alleged that they are. Contrary to what is implied in NARUC's instant pleading specialized

---

[1] Companion petitions were filed by the United States Independent Telephone Association (No. 77–420) and the American Telephone & Telegraph Co. (77–421). The National Association of Regulatory Utility Commissioners and the public utility commissions of several states have moved for leave to file briefs as *amici curiae* in support of the petitions for writ of certiorari.

[2] *Specialized Common Carrier Services,* 29 FCC 2d 870, 31 FCC 2d 1106 (1971).

[3] *Washington Util. & Transp. Comm.* v. *FCC,* 513 F. 2d. 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975); *Bell Tel. Co. of Penn.* v. *FCC,* 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026, *reh. denied,* 423 U.S. 886 (1975).

> carriers were never supposed to be limited to "data communications." Most specialized carriers never even projected that data communications would account for the bulk of their business. They proposed, and have been authorized, to provide the full range of *private line* services. They have never proposed—and have not applied for the facilities required for—the provision of long distance service, which involves the ability to reach every other telephone in the system.[4]

This filing shows plainly that MCI had a different view of its authority when the seminal policy decision was on direct review. More importantly for purposes of the present petitions, it demonstrates that MCI considered it crucial for the Ninth Circuit to understand the boundaries of the competition the FCC had authorized. We believe the Ninth Circuit correctly understood those boundaries and that its decision to affirm was founded upon that understanding as an essential premise. The decision below in this case conflicts directly with that construction of the scope of authorization for specialized carriers.[5]

---

[4] Motion [of MCI] to Strike Consolidated Answer to Motion and Cross-Motion for Leave to File Copies of Commission Decision, pp. 9–10, filed May 15, 1974, in *Washington Util. & Transp. Comm.* v. *FCC*, No. 71–2919, 9th Circuit. [Emphasis in original.]

[5] See FCC Pet., pp. 13–15. The conflict with the Third Circuit decision may be even stronger. In addition to analyzing the FCC's policy under the standard of the *RCA Communications* case, 346 U.S. 86 (1953), the Third Circuit had to consider whether an order requiring AT&T to interconnect with the specialized carriers was overly broad because it required interconnection for all of the specialized carriers' "authorized services." The court found that the order was not overly broad because its scope was limited to the services authorized in the specialized carrier proceeding. Since that proceeding authorized only private line services, the court held, the FCC had not imposed an "unbounded interconnection order." 503 F. 2d at 1273–74. If the Third Circuit had construed Section 214 and the specialized carrier policy as the D.C. Circuit did in this case, the interconnection order might well have been found to be "unbounded" and impermissibly broad. MCI and Southern Pacific ignore the Commission's further point that this Court denied certiorari in both the Ninth and Third Circuit cases on the basis of oppositions emphasizing the limited scope of competition by specialized carriers.

Nor have MCI and Southern Pacific reconciled the decision below with the principle this Court established in *Federal Communications Comm.* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), a case which also arose under Section 214 of the Communications Act. In the *RCA Communications* case, this Court construed Section 214 to require the FCC to make specific public interest findings before authorizing new competitive entry into a communications market. The Execunet court, in contrast, read that statute to require specific public interest findings just to maintain the *status quo* as to markets that no one had even sought to enter. Put another way, the *RCA Communications* case would bar entry by an applicant unless the FCC can warrant that the public interest requires it; the Execunet decision would presume a right to entry by one who has not even sought certification unless the FCC has made an "affirmative determination" that the public interest requires exclusion.[6] Indeed, a direct result of the Execunet decision is the entry of MCI into a communications market without any consideration by the FCC of the questions the *RCA Communications* Court thought essential. The obvious conflict in principle requires resolution by this Court.

2. *Importance.* MCI and Southern Pacific have avoided addressing directly the Commission's argument that this case raises questions of fundamental importance to performance of the agency's common carrier certification function. Intead, they

---

[6] See also *Hawaiian Tel. Co.* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974). The *Hawaiian Telephone* court contemplated the authorization of facilities that were restricted to those services the applicant had shown a need for, just as the FCC contemplated in the specialized common carrier policy decision. This is apparent from the court's recognition that RCA in that case might well have established a need for "satellite service in general" even though it had not justified competitive entry into the international *voice* communications market via those same satellite facilities. 498 F. 2d at 774 n. 10, 776–77. Neither MCI nor the court below has reconciled *Hawaiian Telephone*, as an application of the *RCA Communications* principle, with the decision on Execunet.

have contended that the remand will permit the FCC to remedy any problems raised by the decision. This response ignores the obvious fact that the decision below has significance far beyond the question whether MCI can offer a particular communications service called Execunet.[7] Nothing the Commission can do in further proceedings on remand will alter the novel statutory interpretation the court of appeals has imposed and the radical changes that interpretation will require in all future certification proceedings.

As we have pointed out, the FCC always has construed Section 214 to permit it to consider certification in terms of the services the applicant proposes to offer. Its analysis has not had to go beyond the proposed services; and its limited service authorizations have not included affirmative determinations that the public interest requires the applicants to remain within the service categories they have proposed and applied for. Limitations in appropriate cases have been imposed by issuance of the certificate "as applied for." 47 U.S.C. § 214(c).

Denial of certiorari would require the FCC, in future certification cases, to consider not only the proposed services but also the public interest in introducing competition in areas the applicant never contemplated. Thus, an applicant for certification to provide only television relay service, for example, proposing to convey program material between cities, might have its application held up until the FCC had determined what the public interest requires as to any and all other services that might be carried over the same facilities—even though the

[7] The FCC might well resolve the narrow question whether MCI should be permitted to offer Execunet in further proceedings on remand. But the FCC firmly believes that it should not hold such further proceedings in the context of this case. The FCC authorized MCI and others to offer private line services. When MCI tried to go beyond its authorization to offer Execunet, the FCC required MCI to cease and desist from the offering. If MCI wants to change its authorization to include such nonprivate line services as Execunet, it is free to apply for a modification of its Section 214 certificates or to ask the FCC to conduct a further policy making proceeding along the lines of the specialized carrier proceeding.

applicant has no interest in those services.[8] Further agency proceedings on remand would not alter that new certification procedure.[9]

The decision below is sufficiently important to the administration of the Communications Act to require the grant of certiorari, wholly apart from other considerations. *Atlantic Rfg. Co.* v. *Public Serv. Comm.*, 360 U.S. 378, 382 (1959); *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946).[10]

---

[8] The example is not far fetched. MCI applied specifically for a narrow part of the total package of common carrier services—those under the rubric of private lines. It expressly disclaimed any interest in providing other services, such as ordinary long distance service. (*E.g.*, Pet. App. B, p. 136a. See also excerpt from MCI pleading in Ninth Circuit review of specialized carrier policy decision, quoted at pp. 2–3, *supra*.) Yet, under the procedures required by the court of appeals, the FCC should have considered not only whether competition was desirable in the area proposed by MCI, but also whether the public interest required limitations to that area. Plainly, consideration of this second question would have been time consuming, superfluous in light of the applications, and perhaps fatal to any meaningful chance of competitive entry. Indeed, MCI and the other applicants, joined by the Department of Justice, urged the FCC to confine its analysis of competitive entry to the narrow areas proposed in the applications.

[9] As to changes and disruptions of the industry, we rest primarily upon our petition. (FCC Pet., pp. 18–19.) We add only that some of the changes we anticipated already have begun. MCI recently issued new marketing brochures offering additional nonprivate line services and describing MCI as "part of the telephone system" and as a company offering "long distance telephone service for business." Southern Pacific has filed new tariffs seeking to offer service virtually identical to Execunet. Southern Pacific Transmittal No. 113, Tariff FCC No. 6, filed October 20, 1977. While the D.C. Circuit's stay of its own mandate permits the FCC to delay the institution of these changes until after this Court has acted finally on the matter, we point out that both of these developments would bring significant competition into a sector of the communications industry as to which the FCC never has made the public interest findings this Court required in *RCA Communications*.

[10] MCI refers to bills introduced in Congress during the past several sessions, and appears to suggest that those bills might obviate the need for further judicial review of the Execunet case. But that legislation, if adopted, would alter *substantive* standards for new entry into communica-

3. *Error.* The court erred in construing Section 214 to forbid the FCC from granting limited service certificates in the absence of an affirmative determination that the public interest requires the limitation. (FCC Pet., pp. 20–23.) Section 214(c) expressly authorizes the Commission to issue a certificate "as applied for"—plainly contemplating that the agency in appropriate cases will confine its scrutiny to the terms of the proposal and grant authorizations no broader than "applied for." Contrary to the assertions of MCI and Southern Pacific and the apparent understanding of the court of appeals, the Commission has interpreted the statute this way for many years and has created limited service carrier classifications by regulation as well as by *ad hoc* certification.[11]

---

tions common carriage to increase the barriers to competition. It would not change the certification *procedure* under Section 214, which is what this case is about. (See FCC Pet., pp. 19–23.) The Commission has opposed the legislative changes vigorously because they would undo or restrict its competition policies. *E.g.*, Letter to Hon. Lionel van Deerlin from FCC Chairman Richard E. Wiley (by direction of the Commission), September 23, 1976 (comments on H.R. 12323 and related bills). Possible adoption of legislation which the Commission opposes and which does not address the statutory problem at issue cannot be a substitute for Supreme Court review of this important regulatory decision.

[11] See FCC Pet., pp. 5 & nn. 7–9, 23 & n. 48. See also, *e.g.*, *ITT World Comm., Inc.*, 2 FCC 2d 573 (1966) (granting application for modification of limited service certificates to permit voice service by record carriers); *American Tel. & Tel. Co.*, 38 FCC 1222, *aff'd*, 1 FCC 2d 374 (1965) (allowing AT&T tariffs to become effective offering new service on specific finding that the certificates for the cable had been granted with express authority to provide this service); *AT&T–RCA Communications, Inc.*, 27 FCC 281 (Initial Decision), *aff'd*, 27 FCC 271 (1959) (granting RCA certificates with restrictions against voice message telephone service because RCA had not shown that the public interest required its entry into overseas voice MTS); *AT&T*, 8 Pike & Fischer Rad. Reg. 1217 (1955) (granting certificate to lay cable to Hawaii and explicitly permitting AT&T to provide record service on national defense grounds). *Compare RCA Global Comm., Inc.*, 37 FCC 2d 1043 (1972) (granting certificate to lease satellite circuits and to provide private line voice service to Hawaii), *rev. sub nom. Hawaiian Tel. Co* v. *FCC*, *supra*, 498 F. 2d 771 (on grounds that the FCC had not made affirmative public interest findings that would justify RCA's entry into the private line voice service market.)

As a practical matter, it would make no sense to require the agency to consider the universe of services when it could act on a limited certificate far more expeditiously by considering only the services applied for.[12] By restricting its analysis to private line services in the specialized carrier proceeding, the FCC avoided the difficult and time consuming questions it would have had to confront before opening the entire spectrum of communication common carrier services to competition. The court of appeals has held, however, that the cost of that avoidance was the inadvertent opening of all services, because the FCC did not affirmatively determine that the public interest required limitations. Requiring so broad a proceeding might have stopped the FCC's bold venture into competition before it started.[13] Revising the results of that proceeding, as the court below has done, opens communications markets to competition without the requisite statutory findings, and makes effective an order dfferent from any the FCC has granted.

MCI's and Southern Pacific's reliance upon the FCC's order in Docket No. 19117 [14] is misplaced. First, and most important,

---

[12] This Court has held repeatedly that agencies and courts need decide only those questions that are before them for resolution. (See FCC Pet., pp. 20–21 n. 42). In a case involving another certification statute, the Court said, "We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application" when the applicant himself seeks only a certain favor and makes no claim beyond that favor. *United States* v. *Maher*, 307 U.S. 148, 156 (1939). MCI and the other specialized carriers never have applied for anything beyond certification to provide private line services.

[13] In other contexts, this Court has made clear that agencies and legislatures may implement programs step by step, adopting policies that address part of a problem without taking on the entire matter at once. *Cf. City of New Orleans* v. *Dukes*, 427 U.S. 297, 303–04 (1976); *Katzenbach* v. *Morgan*, 384 U.S. 641, 657–58 (1966). So here, the FCC was not required to resolve the entire matter of competition in communications services in the context of the specialized carrier proceeding.

[14] *Authorization of New or Revised Classifications of Communications*, 39 FCC 2d 131 (1973). In that docket, the FCC decided, after receiving comments, not to issue new rules which would have required prior authorisation for any new service offering by any carrier, regardless of whether the new service fitted within the carrier's certification. The FCC had initiated

the court of appeals did not rely on anything the FCC said in that order, but rested its decision entirely upon its perception that the FCC had failed in its specialized carrier proceeding to make the requisite statutory finding to limit MCI to private line services. Second, the FCC did not purport to modify its specialized carrier policy in its order terminating Docket No. 19117; indeed, the order resulted in a non-decision, the FCC terminating the docket without adopting rules because it saw no need for them. Finally, the Commission could not, in any event, take such a significant regulatory step as opening the public telephone network to competition in an abbreviated proceeding which gave no notice of such an intention and announced no such result.[15]

MCI's other arguments do not undercut the substantial reasons advanced for granting the writ. (A) The court of appeals specifically rejected the argument that the FCC had failed to follow the required procedures in adopting the Execunet order. Notice and comment and oral argument were adequate procedures for a tariff investigation leading to a cease and desist order. 47 U.S.C. § 205(a). (Pet. App., p. 18a n. 43.) (B) The court of appeals did not find that AT&T's oral complaint,

---

the docket while the specialized carrier proceeding was pending, out of concern that the established carriers might frustrate new entry by filing new tariffs offering the services that had been proposed by the specialized carriers, while delaying facility authorizations to the new carriers by filing petitions to deny. *Notice of Proposed Rule Making*, 27 FCC 2d 36 (1971). The FCC terminated the docket without adopting rules, because its concern had been "substantially mitigated" by adoption of the specialized carrier policy. As a result of that policy, the Commission said, "new entry is no longer being delayed by the unresolved status of policy questions raised by existing carriers with respect to the service proposals of each new applicant." 39 FCC 2d at 133.

[15] MCI's reading of Docket No. 19117 as removing restrictions on its authorization is hard to reconcile with positions it has taken before the FCC and in court long after the Commission terminated that docket on February 5, 1973. (Pet. App. B, pp. 137a, 153a–68a; see also excerpt from MCI pleading in Ninth Circuit, quoted at pp. 2–3, *supra*, which was filed more than 15 months after the FCC had issued its final decision in Docket No. 19117).

prior to initiation of proceedings with regard to Execunet, had infected the Commission's decision making process. The complaint was entirely consistent with the Communications Act, 47 U.S.C. § 208; with the Commission's rules governing *ex parte* contracts, 47 C.F.R. §§ 1. 1201–1251; and with the FCC's practice of relying upon complaints by the public and by competitors to help it police the common carrier industry, *Rules Governing Ex Parte Comunications*, 1 FCC 2d 49, 57, 58, (1965). Moreover after receipt of the oral complaint the Commission conducted an extensive inquiry on the record, and rested its decision solely upon the comments and arguments of the parties and upon its own interpretation of the policies and tariffs involved. (Pet. App. B, pp. 67a–71a.) (C) The court of appeals did not accept MCI's argument that, even if its authorizations were limited, Execunet is a private line service well within the limitations. (Pet. App. A, pp. 28a.) As the Commission found, a service which permits calls from any telephone in one city to any telephone in other cities on the network, over facilities that are not private in any meaningful sense, and a a toll charge for each call simply is not private line service. (Pet. App. B, pp. 61a–62a.)

4. *Conclusion.* The FCC's objective in the specialized common carrier proceeding was to develop policy to govern applications and to meet a specific need for more and better private line services. Its analysis and its decision quite properly went no farther than necessary to resolve the immediate questions. Its cautious limitation of the competition policy to services "as applied for" was appropriate in view of the very different questions that would surround MTS competition, the time and resources it would take to answer those questions, and the fact that a policy of limited competition would not interfere with realization of its immediate objectives.

The decision below tells the FCC that it did not know what it was doing under Section 214, and that it inadvertently authorized competition in all common carrier services without considering the public interest in so sweeping a change. In short, the court of appeals tells the FCC that it has lost control of its com-

petition policies. MCI, in effect, is telling the FCC that it might have been tricked into opening ordinary long distance service to competition, even though MCI and the other applicants for entry had solemnly assured the Commission and the courts that the only services in question were private line services.

The decision below jeopardizes the FCC's promotion of competition where it is reasonably feasible and where it may reasonably be expected to benefit the public. If the FCC cannot open the field to competition step by step—as it makes discrete findings of public convenience and necessity in the context of concrete proposals—its policies may be delayed or even undone altogether. The court should grant certiorari to review this important regulatory decision.

Respectfully submitted,

DANIEL M. ARMSTRONG
Associate General Counsel,
JOHN E. INGLE,
Counsel,
Federal Communications Commission,
Washington, D.C. 20554
632-7112.

NOVEMBER 7, 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977